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Supreme Court of the United States

OCTOBER TERM, 1938

No. 182

FORD MOTOR COMPANY,
Petitioner,
against
NATIONAL LABOR RELATIONS BOARD.

No. 183

FORD MOTOR COMPANY,
Petitioner,
against
NATIONAL LABOR RELATIONS BOARD.

REPLY BRIEF FOR THE PETITIONER

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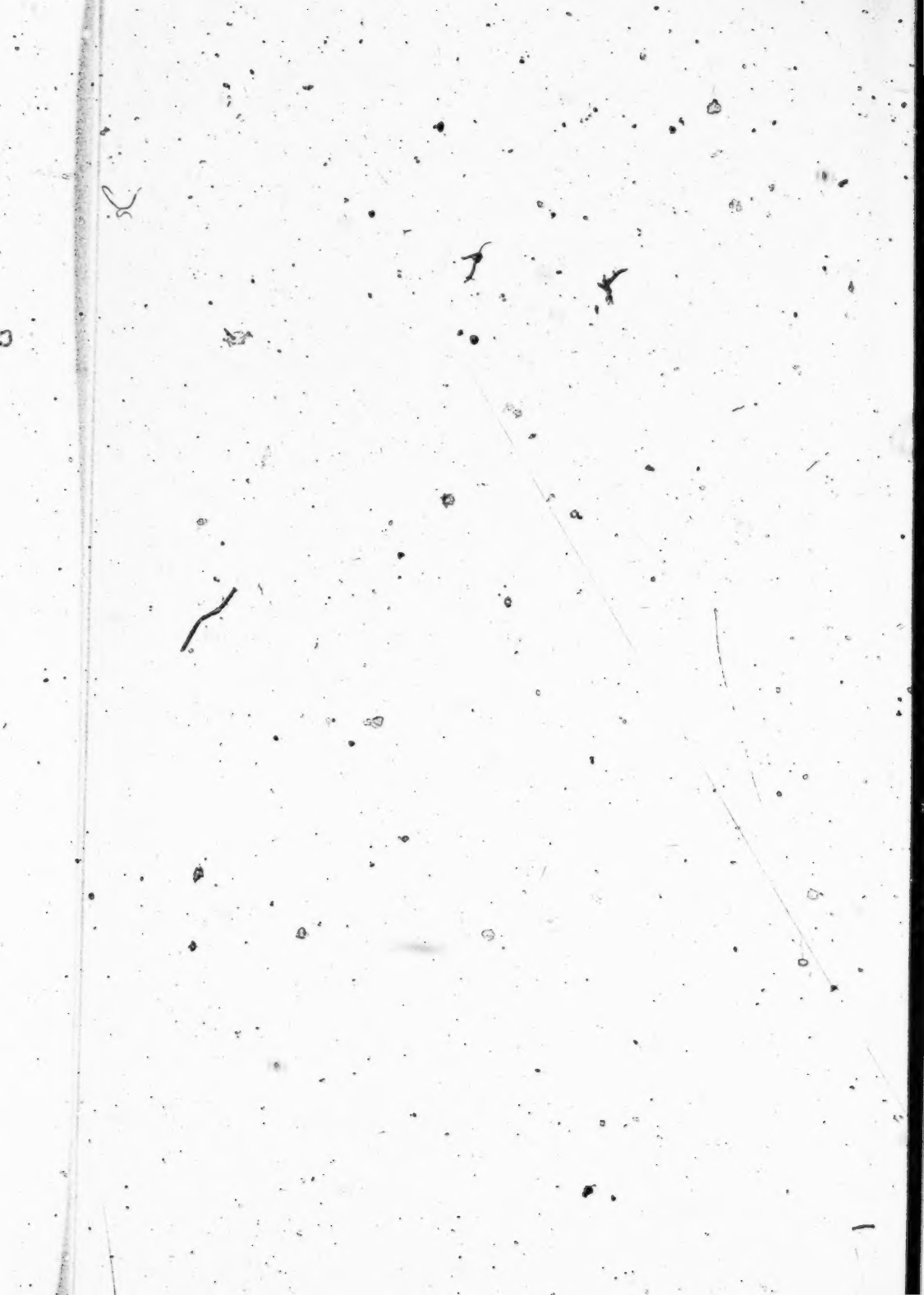

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FORD MOTOR COMPANY, *Petitioner,* *against* NATIONAL LABOR RELATIONS BOARD.	No. 182
FORD MOTOR COMPANY, *Petitioner,* *against* NATIONAL LABOR RELATIONS BOARD.	No. 183

REPLY BRIEF FOR THE PETITIONER

Point I—The Statutory Argument

The Board's brief is remarkable in several respects.

First it is remarkable for the cavalier manner in which it deals with the statute involved in the case. By re-editing our arguments in the manner discussed below, the Board has attempted to remove Sec. 10 (d), (e) and (f) of the Act from their primary place as the determinative factor in the case to a position of comparative unimportance. One would never suppose, from a reading of the answering brief, that this case, like the *Republic* case

> "involves a construction of Section 10(d), (e) and (f) of the National Labor Relations Act, providing for reviews of orders of the National Labor Relations Board." (*In re National Labor Relations Board,* decided May 31, 1938.)

It seems hardly necessary to point out that the meaning of the statute must be sought in the language which it employs; and that if the language be plain, the only function of the court is to enforce it according to its terms. See *United States* v. *Standard Brewery*, 251 U. S. 210, 217; *Caminetti* v. *United States*, 242 U. S. 470, 485.

The meaning of the Act is clear, and the Board confesses the weakness of its position by evading, rather than answering, our statutory argument, which in both cases is our primary reliance, the balance of our argument serving only to confirm the statutory argument and to refute the contentions by which the Board seeks to escape from the plain language of the Act.

Our statutory argument with respect to No. 182 is quite simple: Section 10(d) terminates the Board's jurisdiction when a transcript of the record is filed in a court. Section 10(f) vests the jurisdiction in a court and requires it to proceed to a decree "enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board," thus creating a right in the successful party, whether petitioner or respondent, to have the court enter an affirmative decree in its favor.

We say that the asserted right of the Board and power of the court to permit a "withdrawal" of a petition, so that the Board may take further proceedings, is inconsistent with the above-quoted provisions of the Act; is inconsistent with a "plenary submission of the cause" to the court (see *In re N.L.R.B., supra*), and is inconsistent with the other provisions of the Act which prescribe the court's functions and the limitations thereof, and govern the taking of additional testimony. As we point out below, it is also inconsistent with the restrictions

which the Act imposes upon a party opposing the Board's order. (See *infra*, pp. 44-47.)

The Board's "statutory argument" in No. 182

The Board does nothing to refute our analysis of the statute, beyond hinting vaguely at some significance to be attached to the statutory words "the court * * * shall have power," and attempting a *reductio ad absurdum* which is itself grounded in absurdity.

At pages 32-33 of its brief, the only place in its Point I where it dignifies the statute by anything resembling an argument, it refers to our "final contention" (which actually is our fundamental contention and the first in order in our brief) that the Act requires a circuit court of appeals to proceed to a decree affirming, modifying or setting aside the Board's order once its jurisdiction attaches; and it then says (Ans. Br. p. 32):

> "The Act, of course, does not so state. Section 10(e) says only that a court 'shall have power' to enter a decree, not that it *must* do so."

With this cryptic remarks the argument on the statutory language is dropped, and the *reductio ad absurdum* referred to is taken up. Nowhere is it made clear what considerations are to govern the exercise of the court's power, which the Board thinks is not mandatory. Apparently the test for the exercise or non-exercise of such power is the will of the Board. Though it invoke the court's power upon what this Court has described as a "plenary submission of the cause to the court" (see *In re N.L.R.B., supra*), it may stop the operation at any point merely by "withdrawing" its petition.

Such is the necessary implication of the Board's argument. If it means something less than that, its meaning

has not been made clear. It has proposed no test of when the court shall exercise its powers and when it shall abdicate them in favor of the Board. It has gone no further than to suggest that the Congress has committed to the courts powers of a wholly discretionary character, laying down no standards to determine when the judicial discretion shall be exercised.

Such is not a normal and natural meaning of the words used in a statute which provides for a judicial review of an administrative proceeding. No other statute providing for such review has ever been so construed. No other administrative body has ever asserted the right to divest the court's jurisdiction at will, or even the right to ask the court voluntarily to divest itself of jurisdiction without deciding anything, in order that further administrative proceedings may be taken.

As we have pointed out in our brief, words used to define the functions of a public authority, though permissive in form, are uniformly construed as mandatory (cases cited, Br. p. 21). "Shall have power" means shall have power and shall exercise the same whenever its jurisdiction is properly invoked. There is no other reasonable meaning.

Underlying the Board's whole argument is an effort to misstate our position. We do not suggest that no case may ever arise in which a dismissal of the Board's petition would be appropriate. If on a petition by the Board the respondent pleaded that the Board had failed to comply with the Act by serving the order upon respondent before filing its petition to enforce, we suppose that the court might permit the Board to dismiss its petition without prejudice to a renewal thereof after the order had been duly served. Or if a respondent established that

it had already fully complied with the terms of an order of the Board having no prospective operation, we suppose that the court might dismiss the petition because of the absence of a proper subject of judicial power (Const. Art. III, Sect. 2, cl. 1).

But where the Board files a petition and the respondent by answer sets up defenses which go to the validity of the order, and some of which go to the validity of the entire proceeding, we can conceive of no principle which would permit the Board to revive its jurisdiction over the case at will; to appropriate the court's function of passing upon the respondent's defenses; to exercise the court's function of determining whether and what additional testimony shall be taken, and the court's statutory duty to set aside the order if it is invalid. As we said in our brief, the Board is asserting a right to halt the process of judicial review whenever it is pleased to do so.

The Board's second attempt to meet our statutory argument suggests that it "leads to the absurd conclusion that the court *must* proceed to a conclusion in a case even though *neither* party so desired." It is then pointed out that joint petitions to dismiss petitions for enforcement under the analogous Federal Trade Commission Act have been allowed, and it is said (Ans. Br. p. 33):

> "The concept of a judicial juggernaut which, once started, cannot be stopped by either party or by both together is so contrary to all reason that it would certainly require the clearest language to justify such result."

It seems hardly necessary to suggest that this argument is ridiculous. The wheels of the judicial machinery are

not self-starting, nor are they self-continuing; and if neither party wants a case to proceed, it cannot proceed. Moreover, if both parties ask that the petition be dismissed the court must dismiss it, since there has ceased to be a case or controversy which is the subject of judicial power.

It will be seen that the Board's statutory argument leads nowhere, and gives no reason why the Act should not be construed to mean what on its face it seems to mean. Section 10(e) and (f) provide that, whichever party invokes its jurisdiction, the court shall proceed to an affirmative decree in favor of the successful party, whether it be the petitioner or the respondent. Once the court's jurisdiction has attached, the statute gives one party no more power to control the proceedings than it gives to the other party. Their rights are strictly mutual. Whichever one prevails is entitled to an affirmative decree in its favor.

In this connection, we wonder whether the Board would contend that the rule works both ways; that if a "person aggrieved" sues to set aside the Board's order, and the Board spends several months in litigation before the court, the petitioner in such a case would have an "absolute right" to dismiss its petition without prejudice, thereby allowing it to commence an entirely new proceeding in another circuit court of appeals, or requiring the Board to commence an entirely new proceeding to enforce its order. Perhaps this question may be answered at the oral argument.

The Board's "statutory argument" in No. 183

In No. 183 the Board seeks to establish an "inherent" power to remand the case, apart from and above the provisions of the Act. So far as the Act is concerned, it contents itself with another effort to distort our argument into a proposition which is wholly untenable, and therefore easily answered.

Our position is that the mandatory language of the Act requires a determination of the case, and precludes a "remand" which is the equivalent of a dismissal of the petitioner's case on motion of the opposite party, without a statement of any grounds which would justify such a dismissal, and without any exercise of the function assigned to the court by the Act. We say that such a "remand" is not a remand at all, but is an abdication of the court's jurisdiction in favor of the Board.

The Board re-edits our argument past recognition (Ans. Br. p. 44), claiming that we contend, first:

> "that there is no power in a Circuit Court of Appeals to remand a cause to an administrative tribunal"

and second:

> "that if there be such a power, it does not exist in the present case, because it would be inconsistent with the provisions of Section 10 of the Act."

Thus the Board attempts to put us in the position of arguing that the statute makes this proceeding different from other proceedings to review administrative orders,

in that it precludes the exercises of a power which is normally exercised in all other cases.*

Our affirmative argument under the Act is thus turned into a negative argument, and an unsound one at that.

Of course, we have never asserted "that there is no power in a Circuit Court of Appeals to remand a cause to an administrative tribunal," and we could hardly make such an argument in view of the numerous cases, which are cited and fully discussed in our brief (50-57), wherein

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*The Board also pretends to misunderstand our argument that a remand before decision is a contradiction in terms and that normally a remand will occur only when an order has been set aside. The Board restates our argument as follows:

> "that even if the court below had the power to send the case back to the Board, the manner in which the power was exercised was improper. * * * that the Circuit Court of Appeals should have set aside the order of the Board before the remand." (Ans. Br. p. 50)

In other words, the Board is pleased to consider our argument as merely a procedural objection to the effect that the court, in remanding the case, did not take the technical step of setting the order aside.

Having set up this straw man, the Board proceeds to destroy it to its own satisfaction by saying:

> "It is plain that, at best, the argument relates simply to a question of procedural technique which could be decided either way without any practical consequences whatever. In essence, the argument is that the court should have set aside the order, rather than remanding it so that the Board could set it aside." (Ans. Br. p. 50)

If we had ever made this argument, or if the argument had any significance in the present case, the Board's comment thereon would lend itself to a very simple reply, namely, that the difference between having the court set aside the order and having the Board set aside the order is that the one procedure is provided for by the statute and the other is not.

However, since we have not made the argument; since it has no significance in the present case, and since we are concerned with "practical consequences" and not "procedural technique", it seems unnecessary to deal further with the Board's annihilation of this straw man (Ans. Br. pp. 50-51, Point III-B-1).

courts have "remanded" cases to administrative bodies or recognized that such a "remand" might be made in a proper case. We have some difficulty in seeing why the Board requires five pages, and the citation of 13 decisions, in order to refute a proposition which is ridiculous on its face (Ans. Br. pp. 45-49).

Nor have we ever suggested that a power to remand, otherwise existing under established judicial practice in administrative cases, is excluded or even limited by the provisions of the Act. The Board attributes such a contention to us (Ans. Br. 44, 47-48), after which it examines the statute, finds in it no evidence of an intention to exclude such an "inherent power" which would otherwise exist, and concludes (this being the sole argument which it addresses to the statute) that the "inherent power" exists in spite of the statute. In this part of its brief the Board is shadow-boxing with an imaginary adversary, and is not addressing itself to any contention which we have made.

The Board says that in Federal Trade Commission and Interstate Commerce Commission cases the courts have exercised an "inherent" power to remand the proceedings to those administrative bodies. We do not know what is meant by an "inherent" power, as distinguished from a power which is not "inherent"; but we have no doubt that whatever power of remand was found to exist in the cases cited arising under other statutes might likewise be found to exist in cases arising under the Act.

The question is not whether situations may arise in which the courts are called upon to do something which can be described as a "remand" of the case—because it is perfectly clear from the authorities that such situations have frequently arisen—but whether a "remand" was proper in the situation presented in this case.

If the language of the Act can be construed to mean that it is discretionary with the court whether or not to review an order of the Board, and that therefore the court has full power to send the case back to the Board for further proceedings whenever it may see fit, with or without a decision of the issues, then doubtless a "remand" is a proper manner in which to exercise such discretion.

But if Sec. 10 of the Act must be construed—as all other statutes providing for judicial review have been construed—as imposing a duty upon the court to determine the issues raised and to decide the case, then a remand without such determination and decision is obviously improper.

Under such a statute, as this Court pointed out in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 278, the sole function of a remand is to recognize the propriety of further action by the administrative body; obviously, the only purpose of such a recognition is to avoid a plea of *res judicata* as a bar to further proceedings; and the only situation which calls for such a declaration of rights is one in which the decision is unfavorable to the administrative body—in other words, is a situation where (to use the terminology of the present statute) the decree of the court sets aside the administrative order in whole or in part.

The Board's vague conception of an "inherent power" to remand cases leads nowhere, because the acceptance of even its broadest assertions as to such a power would not justify the conclusion that the "inherent power" may be exercised by a court for the purpose of escaping its duty to hear and determine the case. Moreover, the unsoundness of the Board's whole analysis becomes apparent when it is remembered

(1) that the word "remand" means a sending of a case back with directions to the lower court—directions which, incidentally, are enforcible by mandamus, *In re Sanford Fork & Tool Company,* 160 U. S. 427; *Gaines* v. *Rugg,* 148 U. S. 228; *United States* v. *Fossatt,* 21 How. 445;

(2) that at common law an appellate court had no power to remand, but only to affirm or reverse, *In re Frederich, Petitioner,* 149 U. S. 70, 74;

(3) that the power of the federal appellate courts to remand cases has never been recognized as "inherent" but has been the subject of specific statutory provisions since the Judiciary Act of 1789, *Ballew* v. *United States,* 160 U. S. 187, 197 *et seq.;* and

(4) that under the statute governing the federal courts (U.S.C. Tit. 28, §877) the power to remand exists only when a case "shall be reviewed and determined" by the appellate court.

Since the federal appellate courts have no power to remand cases to the lower courts until such cases have been "reviewed and determined," it would be surprising to find that they have such power in respect of administrative tribunals.

The vagueness and confusion in the Board's arguments are due simply to its refusal to recognize the distinction pointed out by this Court in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co., supra,* wherein it was made clear that the word "remand" has at least two entirely different meanings;* that in one sense it de-

* While the Board pays its compliments to the *Nelson Bros.* case, it regards the whole subject as nothing more than a "quibble" (Ans. Br. 47).

scribes the exercise by an appellate court of its statutory function to give mandatory directions to an inferior court, while in another entirely different sense it describes the limitation which a reviewing court puts upon its own decree when it reverses an administrative decision on a ground which does not fully dispose of the controversy but leaves room for further administrative action in the same or a subsequent proceeding.

It is not difficult to explain why the Board is unwilling to recognize this distinction, since a recognition of it makes clear the purpose and function of a "remand" in cases of administrative reviews. And when that purpose and function are understood, all the general propositions asserted by the Board become untenable, and the case is left standing as one which must be decided according to the meaning of the statutory words.

As we have pointed out, the only normal and natural reading of the Congressional intent, as embodied in the words of the statute, excludes an abdication of jurisdiction by the court in favor of the Board, by a remand which is nothing more than a dismissal of the petitioner's case because the opposite party does not care to litigate the issues on the present record.

Point II—Failure of the Board's Proposed Procedure to Meet the Issues

The Board's brief is also remarkable for its total failure to argue one of the principal points of the case, namely, that the action proposed to be taken by it will eliminate only one of petitioner's objections to the validity of the Board's order (Br. 69-74).

The Board perhaps intends to meet this argument by its constant assertion throughout its brief that it is now

affording to petitioner the very opportunity which it complains was denied to it, *i.e.*, the opportunity to except and argue to an intermediate report. This is a complete misstatement of petitioner's position. Petitioner is not now seeking an opportunity to except and to argue before the Board to an intermediate report. It is seeking in the court a decree setting aside the order of the Board, with prejudice to further proceedings before the Board. The failure of the Board heretofore to afford petitioner an opportunity to except and argue to an intermediate report is only one of the grounds upon which petitioner's prayer for relief is based.

Even if the only basis for petitioner's contention were the failure to serve an intermediate report, and the Board confessed that this was error, or that it did not care to litigate the point, it would be the duty of the court to set aside the order. Petitioner's allegations would have been met by a plea of *nolle contendere*; the right of petitioner to the relief prayed for would be conceded, and the duty of the court under the statute would be plain. Since it would not be called upon to enforce the order, or to modify it, and since the case would have proceeded to the point where a decision was required, it would have no choice but to set it aside.

In such a situation the court would not be dealing with a moot question, as the Board suggests, any more than it would be dealing with a moot question in a case where judgment must go for the plaintiff or appellant because the defendant or respondent has defaulted, or has pleaded insufficient defenses, or expressly or by necessary implication has confessed error.

Where an order of an administrative body is set aside, the action of the court may or may not be without preju-

dice, depending on the circumstances. The full power of the court is to set aside the order without qualification; and if it does so, that is the end of the proceeding. *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568; *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291.

Whether it is appropriate for the court to decree that its action in setting aside the order shall be without prejudice to further proceedings generally, or without prejudice to further proceedings of a particular sort, depends upon whether the court determines, after reviewing the case and deciding upon the objections of the aggrieved person, that the full discharge of its statutory duty does not finally dispose of the controversy, but leaves room for further action by the administrative body. The court's determination upon this matter depends upon what it finds to be the legal effect of such of the aggrieved party's objections as it finds to be valid.

The Board seeks to obliterate these distinctions by another resort to sweeping generalizations from particular cases, saying (Ans. Br. p. 22)* that if the court below had decided the case in favor of petitioner on its procedural objections,

> "Probably the court would have reversed the order without prejudice to a new order. It might well have directed that the case stand for further hearing before the Board. But even if the court merely set aside the order, its action would not necessarily bar further proceedings before the Board or be *res judicata* of another order by the Board. Thus the whole basis upon which the formal argument of petitioner is based falls to the ground."

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* We have omitted the citations which follow the respective sentences of this quotation.

It would seem from this summary that the Board's conception of administrative proceedings is that they are never finally disposed of except in favor of the administrative body; that otherwise, like the babbling brook, they go on forever.

The Board's summary implicitly recognizes, however, that in some cases the court's action will permit a new hearing, while in others it will permit only a new proceeding; and that in some cases the court's action in setting aside the order will be *res judicata* of an order in another proceeding, while in others it may "not necessarily" be *res judicata*.

The Board's conclusion, therefore, does not follow from its premises, and the correct conclusion to be drawn from the cases which it cites is that the court must determine in each particular case whether, and to what extent, further proceedings will be permissible under its decision.

Thus, in most of the Interstate Commerce Commission cases which the Board cites,* the invalidity of a rate order was due to the Commission's failure to consider relevant facts and circumstances; and the decision in each case provided for a remand of the case or its equivalent, in order that the Commission might re-determine the matter after considering such facts and circumstances, upon the evidence taken and such additional evidence as might be appropriate. The court's decision did not decree that the rates fixed were improper or that the rates enjoined

* *Atchison T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248; *Louisville & Nashville R. R. Co.* v. *Behlmer*, 175 U. S. 648, 676; *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 29; *Interstate Commerce Commission* v. *Clyde Steamship Co.*, 181 U. S. 29, 33; *Southern Ry. Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, 302; *Florida* v. *United States*, 282 U. S. 1 and the previous decisions of the same litigation.

were lawful, and further proceedings were, therefore, entirely in order. Where, however, more was required of the administrative body than merely a reopening of the same proceeding, the court so specified, *e.g.* in *Interstate Commerce Commission* v. *Clyde Steamship Co.*, 181 U. S. 29, 33, when the case was remanded so that the Commission might "make an original investigation" of the questions involved.

The cases which the Board cites, involving other rate fixing administrative bodies, are not relevant.*

The Federal Trade Commission cases do not support the Board's argument but hold in fact to the contrary. *Federal Trade Commission* v. *Mid West Mills*, 90 F. (2d) 723, was substantially identical on both the facts and holding with *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, cited and discussed in our brief, pp. 51, 55.

In *James S. Kirk & Co.* v. *Federal Trade Commission*, 59 F. (2d) 179, the court set aside the entire order of the Commission. As to one part of it, involving the use of the word "Castile" to designate soaps, the setting aside of the order was final and the controversy was at an end. As to the other part of the order, having to do with the words "olive oil," the court held that the issue was not within the pleadings and had not been litigated, and specified that the order was without prejudice to further proceedings with respect to that issue.

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* *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 423, contains a dictum to the effect that where the notice of the administrative hearings was inadequate, the duty of the court was to set aside the order "without inquiring into the merits, as having been made without notice of hearing" and not to appoint a master for the taking of more testimony. Obviously, the taking of additional testimony could not cure the defect referred to in this dictum.

It is quite true that if, on review of an administrative order, it is determined that the order is invalid because respondent has not been accorded a full and fair hearing, there may be no occasion for the court to consider the "merits." * *Morgan* v. *United States,* 298 U. S. 468; 304 U. S. 1. However, the fact that a court may decline to consider the "merits"—at least in rate cases—when it has found the hearing inadequate, affords no ground for limiting its inquiry into the validity of the hearing to only certain aspects thereof, leaving undetermined issues raised as to the validity of the hearing in other aspects. To do so is clearly to deny the aggrieved person his right to judicial review, by refusing him a determination as to the extent to which his defenses preclude or restrict the further action of the administrative body.

To put the case more concretely, to determine an issue which goes only to the validity of the particular order made, and to refuse to determine an issue which may affect the validity of the entire hearing or the entire proceeding and therefore vitiate any order based on such hearing or proceeding, so restricts the scope of judicial review as to deprive the aggrieved party of his right under the Act to have the administrative order "set aside" and the proceeding brought to an end if his defenses justify it.

All that the Board's cases stand for, and all that the Board contends that they stand for (Ans. Br. p. 21-22) is that the court below might, after deciding the case, permit

* Of course, in considering both the procedural questions and the "merits," a court's inquiry is confined to whether the action of the administrative body conforms with law. Even when reviewing findings with a view to determining whether they are supported by substantial evidence, the court does not consider the "merits" anew.

the Board to take further action in the present proceeding, or in some new proceeding as to which the court's decision would not be *res judicata*. This is quite true; it *might* sanction further administrative action. *Non constat* that it would permit such further action to be taken by means of an interim report based on the hearing already had, or that it would allow further action in the present proceeding, as distinguished from a new proceeding.

The Board attempts to meet this difficulty by arguing (Ans. Br. 20):

> "Obviously, petitioner can claim that the further proceedings before the Board will be prejudicial only upon the assumption that they will be invalid, or that, if the case were to be decided in the court below, it would be ended entirely—that the court would find petitioner's procedural and other objections meritorious and would leave the Board no alternative except a completely new proceeding from start to finish. We submit that neither assumption may be made."

The arguments which the Board addresses to the first of these "assumptions" are irrelevant (Ans. Br. 21), because our point is not that the Board will act improperly, or will not try to discharge its duties conscientiously. Our point is that, if we now have an objection which goes to the validity of the entire proceeding or the validity of the hearing, any action which the Board takes in the way of an interim report and making of a new order on the present record will be futile and hence invalid, because no such order will ever be enforcible.

It may be pointed out here, in passing, that in making these arguments we do not concede that any prejudice from the Board's proposed action need be shown, because

the action is not provided for by the statute and is improper whether or not prejudice can be found.

It may also be pointed out that the Board makes no answer to our contentions when it argues that, when the interim report is served, we can make any and all objections which we have to the Board's procedure. We are not interested in having the Board sit in judgment on its own procedure but are asking for, and are entitled to have, a judicial review of the Board's action and, if our defenses justify it, a setting aside of its order and such a limitation upon further administrative action as the justice of the case may require.

The second "assumption" which the Board thinks improper is in two parts. The second part is that a decision on one or more of our objections "would leave the Board no alternative" except a new proceeding or (which the Board does not say but which is equally relevant) a new hearing.

Our position is that we do not have to make that assumption, because the orders below would be improper if a favorable decision on one or more of our objections *might* require a new proceeding or a new hearing; that at the present time it is not necessary to decide whether, as a matter of law, such a decision would necessarily have that effect; that the recommittal of the proceeding to the Board cannot be justified until either (1) these objections have been determined, and determined unfavorably to petitioner, or (2) it has been determined that these objections do not go to the validity of the proceeding or the hearing held therein.

But even if it were necessary to make such an assumption, it seems to us that it is the only one that is permissible. To take one example of our objections, we have raised issues with respect to the conduct of the trial

examiner (R. 11-12, 66-67, 82-83; see main brief, pp. 69-71) which, if decided in our favor, clearly would invalidate any further proceedings based on the record already made.* *Cf. Fitchburg Steam Engine Co.* v. *Potter,* 211 Ill. 138, cited and quoted from at p. 66 of our main brief. To the same effect see the cases cited in the footnote below.†

To take another example, we have alleged that there is no evidence to support material and necessary findings which the Board has made or must make in order to support an order upon the charges made in the complaint (R. 11, 66); and under the authority of *Federal Trade Commission* v. *Curtis Publishing Co. supra,* a decision in our favor upon such allegation would require the setting aside of the order without any remand for further administrative action.

Upon the point under discussion, *Federal Trade Commission* v. *Curtis Publishing Co., supra,* seems conclusive, though for some inexplicable reason the Board cites it in support of its argument (Ans. Br. p. 45).

In that case the Publishing Company contended that the Commission's order was not supported by the findings

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* We have also raised issues respecting the conduct of the Board (R. 12-17, 67-72, 82-83, 106-107) which are discussed in our main brief, pp. 71-72, and which, we would contend, go to the validity of the entire proceeding.

† (a) The following cases involve referees and masters in chancery: *McCormick* v. *Walker,* 142 N. Y. Supp. 759; *Stebbins* v. *Brown,* 60 Barb. 272 (N. Y.); *Dorlon* v. *Lewis,* 9 How. Prac. 1, (N. Y.).

(b) The following cases involve judges of inferior courts: *Morris* v. *U. S.,* 26 F. (2d) 444; *People* v. *Gilbert,* 256 N. Y. S. 442; *Reeves* v. *State,* 267 S. W. 666; *Cf. Berger* v. *U. S.,* 255 U. S. 22.

(c) The following cases involve administrative bodies exercising judicial or quasi-judicial functions: *State ex rel Barnard* v. *Board of Education,* 19 Wash. 8, 52 Pac. 317; *State ex rel Getchell* v. *Bradish,* 70 N. W. 172 (Wisc., 1897); *Stockwell* v. *The Township of White Lake,* 2 Mich. 341; *State* v. *Crane,* 36 N. J. L. 394; *Cf. Tumey* v. *Ohio,* 273 U. S. 510; *Ex Parte Robinson,* 28 T. L. R. 288.

and that findings necessary to sustain the order would not be supported by the evidence. The circuit court of appeals having found that the order was not supported by the findings, the Commission asked this Court to remand the case to it for the purpose of making the findings which were lacking. This Court, however, held that such a remand might not be made until it had first decided that the necessary findings would be supported by the evidence. Therefore the Court examined the record, and having decided that such findings, if made, would not be supported by the evidence, it refused to remand the case and instead set aside the Commission's order.

The *Curtis* case is conclusive of the issue in both No. 182 and No. 183, not only because the general principle which it applies is applicable to the various defenses which the petitioner has asked the court to determine, but also because, as pointed out above, the specific defense relied on in the *Curtis* case has been set up in the petitioner's answer (R. 11, par. 11) and its own petition (R. 66, par. 12).

We come now to the other part of the second "assumption," to which the Board has objected, namely, the assumption that, if the court below should decide the case it "would find petitioner's procedural and other objections meritorious."

It must be apparent that this assumption is not only permissible but is necessary, because the proceeding in the court below had not yet reached the stage of a decision upon our objections,* and since the Board has not denied the allegations of either the answer in No. 182 or the petition in No. 183.

* See cases cited (Br. 29-36; Ans. Br. 26-27) involving applications for voluntary dismissals where the defendant has asked for affirmative relief. Under the general principles stated above, it is assumed that the defendant's cause of action for affirmative relief is meritorious.

It results from the foregoing that the Board's argument (Ans. Br. 20-23) virtually concedes our case. It admits that if we advance defenses which would be conclusive of the present proceeding or of any order based on the hearing already had, we would have a meritorious objection to the Board's motion to dismiss its petition and, on the same theory, to its motion to remand in No. 183. Since it is clear that we have raised such defenses; since several of them would clearly be conclusive of the present proceeding and any order which might be made upon the hearing had therein, and since their meritorious character must be assumed, the order below must be reversed even on the Board's own theories.

Point III—The Right to Voluntary Dismissal

We have already dealt with that part of Point I of the Board's argument which relates to the provisions of the Act. There remains the argument by which it seeks to escape the language of the Act, namely, the general principles which it regards as applicable to voluntary dismissals. According to the Board's view (Ans. Br. pp. 18-31) they are as follows:

> 1. That a petitioner in an administrative proceeding, like a plaintiff in any civil case, has an absolute right to a dismissal without prejudice at any time before judgment, and the court has no discretion to deny such dismissal, unless the petitioner
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> (a) has asked for affirmative relief; and in addition,
>
> (b) can show some substantial prejudice arising from the denial to him of an opportunity to seek such affirmative relief in the pending proceeding.

2. That the relief which the petitioner has asked for in No. 182 is not "affirmative relief."

3. That even if the relief asked by petitioner is affirmative relief, it cannot successfully oppose a dismissal without prejudice because it cannot show that the denial of affirmative relief would cause it any substantial prejudice.

4. That even if petitioner can show both (a) that it is entitled to affirmative relief and (b) that it would be substantially prejudiced by the denial thereof, it would still be discretionary in the court to grant a dismissal without prejudice, and the court below correctly exercised such discretion pursuant to a "policy of avoiding needless litigation which was invoked by the Board in support of its motion."

Not one of these four propositions is supported by the authorities cited, or by any other authorities, even as applied to plaintiffs in ordinary civil litigation.

Nor is there even a logical basis—much less the authority of decided cases—to apply such principles to the kind of a dismissal which was sought by the Board below. We have pointed out (Br. 28) that the reason for the rule permitting voluntary dismissals in certain circumstances does not apply when an administrative tribunal seeks a dismissal of the petition for enforcement in order to take further proceedings before itself.

The Board either misunderstands our argument or pretends to do so, because the argument with which it answers the point is non-responsive (Ans. Br. 19). Our argument is not that such a dismissal should not be allowed *because* further proceedings before an administrative body will follow, but that such a dismissal is not a dismissal of the "proceedings" at all, that it is nothing more

than a transfer of jurisdiction from the court to the Board. The authorities which the Board cites (but incorrectly interprets) would fully support its position if it were seeking to dismiss for the purpose of setting aside its order, dismissing its own complaint, and ending the present *proceeding*. They have no application at all to the situation actually presented in this case, when it does not propose to end the proceeding but only to recapture control over it.

Jones v. *Securities and Exchange Commission*, 298 U. S 1, which the Board cites in its argument but which in no way supports it, is an illustration of what a real dismissal would be. There the party who had invoked the jurisdiction of the Commission desired to withdraw his application and terminate the whole proceeding; and the discussion in the opinion is addressed to that situation. The case would be relevant only if the Board's motion below were a prelude to the dismissal of its own complaint.

In any event, the Board's argument is based upon an analysis of the law which the cases do not support and which, in fact, they refute.

Alleged dual requirement of "affirmative relief" plus "prejudice"

The dual requirement of the Board's proposition No. 1, namely, that in order to prevent a voluntary dismissal a defendant must both (a) have asked for affirmative relief and (b) be able to show substantial prejudice resulting from the denial thereof, has no basis except in the Board's interpretation of this Court's language in *Ex Parte Skinner & Eddy Corp.*, 265 U. S. 86, 93-94, which we have quoted in our brief (p. 29) and which we repeat:

> "The usual ground for denying a complainant in equity the right to dismiss his bill without prejudice at his own costs is that the cause has proceeded so far that the defendant is in a position to demand on the pleadings an opportunity to seek affirmative relief *and* he would be prejudiced by being remitted to a separate action."

The Board interprets the italicized * "and" as imposing two requirements—affirmative relief plus additional special prejudice.

There is no need to argue what will readily occur to the Court—that this is not the natural meaning of the words used, especially when the quotation is read in its context. For all that the dictum in the *Skinner* case purports to be is a summary of the earlier authorities, and a succinct statement of the law as more fully expounded by the same justice (Taft, *C. J.*) at circuit in the earlier case of *City of Detroit* v. *Detroit Street Railway Co.*, 55 Fed. 569, where he quoted and applied the following statement of the rule (at p. 573):

> "* * * if he [defendant] seeks or has become entitled to affirmative relief, *so that* it would work an actual prejudice against him to have the case dismissed then, the complainant will not be permitted to dismiss his bill." (Italics ours.)

In other words, the dictum in the *Skinner* case means what it seems to mean, and does not mean what the Board attempts to make it mean. Obviously, the reason for the additional clause is that the rule only applies to a case where the dismissal of the plaintiff's bill will carry with it the defendant's cross bill. It is not only necessary that the defendant ask for affirmative relief, but that the

* Italics ours.

dismissal of the plaintiff's complaint will prevent him from getting affirmative relief; and where the defendant may proceed on his cross bill in spite of plaintiff's dismissal, the dismissal is, of course, allowed. *Harding* v. *Corn Products Refining Co.*, 168 Fed. 658, cert. den. 214 U. S. 515.

The statement of Taft, J., in the *City of Detroit* case is supported by every case cited by the Board in its brief for its contrary proposition, and its contrary proposition is not supported by a single one of these cases.*

It is not necessary to rely, however, on any general statement of the law in either of the cases cited, because we are content to rely on the numerous authorities which expound the rule, the plain fact being that in *all the cases* cited by the Board in which defendant sought affirmative relief the court refused to permit dismissal by the plaintiff and that *not one case* granted such dismissal on the ground that special prejudice in addition to a loss of affirmative relief had not been shown.†

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* The best that the Board can do with these authorities is to take a case like the *City of Detroit* case, and because there was present a special prejudice which would result from the dismissal of the complaint, argue that such prejudice was the determinative fact.

The argument is without substance, first, because the same result has been reached in every similar case without a showing of special prejudice and, second, because the opinion in the *City of Detroit* case clearly shows that the case was decided on the ground of defendant's right to affirmative relief, and that the special prejudice was an additional fact, introduced in the opinion by the word "Moreover" after the court had already held in its opinion that the plaintiff could not dismiss. (See 55 Fed. at 575.)

† In fact, not one case granted a dismissal, where defendant had sought affirmative relief, on *any* ground. *Ætna Life Ins. Co.* v. *Wilson*, 84 F. (2d) 330, cited by the Board, permitted dismissal though the defendant had prayed for what we would consider to be affirmative relief, *i.e.*, a declaratory judgment of the invalidity of the insurance policy sued on. The case is contrary to all the other similar cases cited (Br. pp. 31-36), but is distinguishable

The fact is, also, that there is not a single statement of the rule in any of the numerous cases cited by us and by the Board on this point—although almost every case contains a statement of the rule—which imposes a double requirement of affirmative relief plus special prejudice.

We are at a loss to see how the Board can seriously cite the four cases which it cites at page 27 of its brief in support of the proposition that "Unless there be actual prejudice, a prayer for affirmative relief is immaterial."

We discuss elsewhere two of the four cases cited—*City of Detroit* case * and *Ætna Life Ins. Co.* v. *Wilson,* 84 F. (2d) 330.†

The other cases which the Board cites not only do not support its propositions, but refute them. These cases are:

Harding v. *Corn Products Refining Co., supra.*
Whittel v. *Roche,* 88 F. (2d) 366.

Harding v. *Corn Products Refining Co.* turned *expressly* on the ground that the plaintiff had made his motion to dismiss without prejudice to a continuation of the suit on the defendant's cross bill. The case clearly recognizes that the presence of the cross bill would otherwise have defeated the plaintiff's motion.

Whittel v. *Roche* turned on the fact that the cross bill was filed after the motion to dismiss. The case clearly

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* *Supra,* pp. 25, 26, footnote, and *infra,* p. 28.
† *Supra,* p. 26, footnote.

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on the ground that the defendant in another action instituted by itself was seeking the same "affirmative relief."

Moreover, the court in the *Ætna* case did not place its decision on the ground that no special prejudice had been shown, but placed it on the ground that what defendant had asked for was *not in fact affirmative relief.* In this respect, also, the case is contrary to all the other authorities.

recognizes that a filing of the cross bill prior to the motion to dismiss would have defeated the latter.

The Board (Ans. Br. 25-26) attempts to distinguish the cases cited in our brief (pp. 31-36) by arguing (1) that in some of the cases the loss of his right to affirmative relief would have worked a hardship on the plaintiff, and (2) that in others (specifically the patent cases) the defendants were asking for "substantially more than that which they would have had by a successful defense in the plaintiffs' cases." *

The first distinction does not advance the argument for the fact is that the courts did not place their decisions upon the ground of special prejudice, but placed them squarely on the ground that the defendant had asked for and was entitled to have affirmative relief, and that the plaintiff could not defeat his right thereto by dismissing the complaint. It must be remembered, of course, that there are two separate and overlapping rules: (1) the general rule that the plaintiff may not dismiss his bill where the defendant would be substantially prejudiced, and (2) the specific rule that the plaintiff may not dismiss his bill where the defendant has sought affirmative relief. In some of the cases, such as the *City of Detroit* case,† the court invoked both rules, but there is nothing in any of these cases to suggest that both grounds were required for the decision. In fact, the cases clearly show the contrary.

The Board's first distinction is unsubstantial for another reason. All it means is that the Board has examined the cases and has found that each defendant had important

* The Board does not purport to deal with all of our cases, but cites only some of them.

† See discussion, *supra*, p. 26, footnote.

rights involved in the cross-bill, or that there were good reasons why it wanted to go on and have its case decided. There is nothing surprising about that, since a defendant ordinarily does not file a cross-bill unless it has something to litigate and wants its case decided. If this Court decides the present case in our favor, some later brief-writer may attempt to distinguish this case on the ground that the loss of the petitioner's right to affirmative relief would have worked a hardship upon it—as it most certainly would.

The Board's first distinction is simply an attempt to make the cases turn on an issue other than that upon which they were decided, in order that the Board may escape their effect.

The Board's second distinction, with respect to the patent cases, is no more substantial. It is not suggested in what respect the defendants in those cases were asking for "substantially more" than they would have obtained by a favorable adjudication of the plaintiffs' claims on the merits. The plain fact is that in the typical case the plaintiff was suing for infringement of a patent and the defendant was asking for an adjudication of invalidity or non-infringement, or both—precisely the adjudication which it would have obtained if judgment on the plaintiff's complaint were entered in its favor.

Relief "not affirmative"

The Board's second proposition is that the petitioner in No. 182 is not entitled to "affirmative relief," and this argument has been fully dealt with in our brief (pp. 32, *et seq.*). However, there is a new twist to the argument which perhaps deserves mention. It seems to be something like this (Ans. Br. 24-25):

1. The relief to which petitioner is entitled under the Act is something which it can get without filing an answer and without specifically asking for such relief.

2. Hence neither the powers of the court nor the rights of the petitioner were enlarged by the prayer for relief.

3. Hence the petitioner is in the position of a defendant in an ordinary lawsuit who has filed a motion to dismiss or asked for a dismissal in its answer but has not asked any relief running in its own favor.

4. In other words, the petitioner is asking no more than a judgment in its favor on the Board's petition.

5. Ergo it is not asking for affirmative relief.

It may be that the court will be able to follow the march of this argument from premise to premise and to the triumphant conclusion which the Board describes as an "almost self-evident proposition" (Ans. Br. 25). We are unable to follow it, however; for all we can see that it means is that relief is not affirmative unless the defendant has to ask for it, and hence it is not affirmative here because the Act provides it without any asking—a proposition which is absurd on its face.

The Board's third proposition—that petitioner cannot oppose a dismissal without prejudice because it cannot show both the right to affirmative relief and prejudice resulting from a denial thereof—is a conclusion derived from its first proposition, and has already been dealt with.

Dismissal a matter of discretion

Before discussing the Board's fourth proposition, we point out that we are not quite clear that the Board seriously advances it, although such seems to be the tenor of its argument from pages 29-31, and we can derive no other meaning from paragraph 3 on page 29. We therefore address ourselves to the argument on the fourth proposition as we have stated it.

This proposition assumes that petitioner can satisfy both the requirement of affirmative relief and the additional requirement of special prejudice, but asserts that the Board is nevertheless entitled to its dismissal because (1) the court had discretion to allow it and (2) it exercised that discretion properly, in pursuit of the Board's "policy of avoiding needless litigation" (Ans. Br. p. 31).

Here there is a shift in the argument. Up to this point the dismissal has been sought and defended as an "absolute" right (Ans. Br. 16). Now it becomes a matter of judicial discretion.

And here we find an interesting example of the Board's conception of the relative rights of the petitioner and the respondent. The Board did not invoke the court's discretion below; the court did not purport to exercise its discretion, and the only reference in the record to the question of discretion is an argument by petitioner below that, even if the motion could be regarded as addressed to the court's discretion (which petitioner claimed it could not, and which the Board did not claim it was, R. 36-38), it would have to be denied (R. 45-46).

Nevertheless the Board now argues that the action below was an exercise of discretion; and it further contends that the petitioner may not counter with a claim that it was an abuse of discretion, because petitioner did not

make that claim in its petition for *certiorari* (Ans. Br. p. 30).

In other words, the Board may raise a new point in this Court, and must prevail upon it—not because it is a sound or proper point—but because the petitioner is estopped to answer it.

While we know of no principle of decision which would permit such an absurd result, the grounds upon which petitioner sought and obtained *certiorari* in this case are quite comprehensive enough to be a basis of attack on the order, whether regarded as discretionary or as a matter of "absolute" right (Pet. for Cert. pp. 3-11). On the other hand, it seems very doubtful to us that the Board can now defend as an exercise of discretion what it did not seek as a matter of discretion, and what the court did not purport to grant upon an exercise of discretion.

However this may be, the Board's fourth proposition, as we understand it, is that the court had discretion, and properly exercised such discretion, to allow the Board to withdraw its petition in spite of the fact that petitioner (a) was entitled to affirmative relief and (b) would be substantially prejudiced by the denial thereof resulting from such dismissal. Neither this proposition—nor the more limited propositions that the court would have discretion to allow the dismissal if *either* of the two elements of affirmative relief and special prejudice were present, but without the other—finds the slightest support in any of the authorities.

The Board has cited six cases to sustain its fourth proposition and four cases to sustain the proposition that "Similar power exists to permit appellants, including the United States, to discontinue an appeal over the objection of the appellee." (Ans. Br. 29.)

Of the six direct citations, three involved no question of affirmative relief. *Penn Phonograph Co.* v. *Columbia Phonograph Co.*, 132 Fed. 808, does no more than quote the language from the *Pullman's* case which we quote below. Neither the *Penn Phonograph* case nor *Pilot Life Ins. Co.* v. *Habis*, 90 F. (2d) 842, contains any language to indicate that there is discretion to permit dismissal if defendant will be prejudiced. *United Motor Service* v. *Tropic-Aire*, 57 F. (2d) 479, is clearly in accordance with all the authorities in stating that *;

> "There are well-established just exceptions to this rule, to-wit, *where defendant asks on the pleadings affirmative relief* or where he has acquired in the proceedings some substantial right or advantage that he would lose by virtue of the dismissal." (p. 481.)

Neither these three cases, nor the other three to which we next refer—where some question of affirmative relief was involved—furnish a vestige of authority for the Board's proposition. In two of the latter cases, *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, and *Dooley Improvement's, Inc.* v. *Motor Improvement's, Inc.*, 6 F. Supp. 161, it was held that the filing by defendant of a pleading seeking affirmative relief re-

* The court said that "No affirmative relief was asked" (p. 480) and after reviewing the authorities, stated the rule as follows (p. 482):

> "If it is inequitable to permit the dismissal of an equity case it should not be done. Whether it is inequitable is to be determined by the trial court in the exercise of a sound discretion."

In other words, the trial court was to exercise a sound discretion in determining whether it would be inequitable, i.e., prejudicial, to the defendant to allow plaintiff to dismiss. There is no showing that, prejudice having been shown, the court still had discretion to permit such dismissal.

moved the plaintiff's right of dismissal even though filed *after* plaintiff's motion to dismiss.

In the *Pullman's* case this was an alternative ground of decision. In the *Dooley* case the court said:

> "If a defendant has acquired during the progress of a case a right to affirmative relief and embodies that right in a counterclaim, a court of equity is bound to consider such a counterclaim, whether filed before or after plaintiff files a motion to dismiss its bill of complaint. *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, * * * (p. 162).
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> * * *
>
> "It is obvious that a denial of defendant's right to prove its counterclaim would of itself be prejudicial and an inequitable hardship to the defendant. Upon this ground alone the motion to dismiss should be denied."

Not only is the holding of the *Pullman's* case opposed to the Board's proposition for which the case is cited, but the language of the court at the dictum page referred to by the Board (p. 146) lends no support to the Board's proposition. Apparently the Board intends to call attention to the statement of the court that

> "Unless there is an obvious violation of a fundamental rule of a court of equity or an abuse of the discretion of the court, the decision of a motion for leave to discontinue will not be reviewed here."

Clearly it is a fundamental rule that plaintiff may not dismiss in a case where defendant seeks affirmative relief, and that the court has no discretion in such a case. Moreover, the Court in support of the quoted statement

cited *Stevens* v. *The Railroads*, 4 Fed. 97, where the court refused to permit a voluntary dismissal of a suit to enforce a lien (although defendant had taken no step other than filing an answer), on the ground that, if successful, defendant would be entitled to "an adjudication that no such lien exists."

The third of the three cases cited by the Board which involved a question of affirmative relief, *City of Detroit* v. *Detroit City Ry. Co., supra*, has already been discussed.

The cases governing dismissals of appeals do not justify any detailed analysis. Two classes of such cases are dealt with at pages 58-64 of our brief, and the principles of the subject sufficiently appear from these cases. The cases cited at page 29 of the answering brief are not relevant. There is nothing to indicate that *United States* v. *Griffith*, 141 U. S. 212, was a dismissal without prejudice, and *Latham's & Deming's Appeal*, 9 Wall. 145, and *United States* v. *Belcher*, 294 U. S. 736, clearly were not, but were dismissals which concluded the particular cases.

United States v. *Young*, 94 U. S. 258 was a dismissal made necessary by the exercise of the anomolous power of the Court of Claims to grant a new trial in spite of a pending appeal, and *United States* v. *The Minnesota & N. W. R. Co.*, 18 How. 241, was a public land case where the court granted the dismissal on the Attorney General's assurance that he would not make any further attempts to try the issue in that case, but would institute a new action (as he could do because the railroad was charged with a continuous trespass on public lands).

It is apparent that none of these cases have any significance to the argument in which they are cited.

On the other hand a rule analogous to that prohibiting a voluntary dismissal when the respondent party is entitled

to affirmative relief is applicable to the appeal cases. The situation does not often arise, because normally there is a cross appeal in such a case and the appellant's dismissal would not affect the appeal of the opposite party. However, when a situation arises in which the appellant's dismissal would bar the appellee's rights, such a dismissal is denied. *The John Twohy*, 255 U. S. 77.

That was an admiralty case, in which the ship appealed from a decree partially unfavorable to it. The libellants, relying on the doctrine that an admiralty appeal brings up the case for hearing *de novo*, did not appeal from the part of the decree unfavorable to them. After their time for appeal had expired, the ship moved to dismiss its appeal and the circuit court of appeals granted the motion. This Court reversed, holding that no dismissal should be had because it would prejudice the libellants by foreclosing their right to a review of the unfavorable portions of the decree.

It is submitted that the law applicable to voluntary dismissals is clear; that the Board's attempt to distort it so as to support the orders below is unsuccessful; and that—even taking the Board's view as to the applicability of these principles to a case where it is not asking for dismissal in any real sense of the word but merely to have a transfer of jurisdiction to itself contrary to the Act—the action of the court below was clearly erroneous.

Point IV—Remand of Petitioner's Case

We have already dealt in Points I and II with the Board's principal contentions in support of the order of remand in No. 183. We will here refer only to such of the Board's contentions and authorities as have not been previously met.

The Board cites several Federal Trade Commission cases for the proposition—which petitioner does not deny and which does not help the Board's case—that courts have "recognized or exercised their power to remand actions to the Commission for further proceedings." (Ans. Br. p. 45).

In two of these cases, discussed in petitioner's brief (pp. 53-55), this Court set aside the order of the Commission and refused to remand on the very ground that a remand would be futile, the ground for the invalidity of the order being one which further action of the Commission could not cure.*

In those cases cited by the Board in support of this proposition in which a remand was actually made, the court had fully reviewed the order of the Commission and remanded the proceeding only to permit further action which could not be taken by the court,† because it was of an administrative rather than a judicial character. We do not contend that action similar to that taken in any of these cases would not be proper in a proceeding under the National Labor Relations Act.

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* *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568; *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291.

† *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, discussed in our brief, p. 55; *Procter & Gamble Co.* v. *Federal Trade Commission*, 11 F. (2d) 47, cert. den. 273 U. S. 717, in which the court determined that the Commission had properly found respondent guilty of an unfair practice, but that the order of the Commission was not a practical method of enforcing compliance with the Act, and vacated the order and sent the case back to the Commission for the purpose of determining what other form of order might be appropriate.

In *Ohio Leather Co.* v. *Federal Trade Commission*, 45 F. (2d) 39, the court determined that the order of the Commission was invalid, vacated the order, and remanded the case only because the grounds of invalidity did not preclude further proceedings on the same subject matter.

In *Federal Trade Commission* v. *Balme*, 23 F. (2d) 615 the court "affirmed" the order of the Commission, but, assuming itself without

Similarly, the Board asserts, as though it were important in the present case, that, "this power to remand has been exercised under the National Labor Relations Act itself." Here again the Board asserts a proposition to which petitioner takes no exception, and which fails to help the Board.

The cases cited by the Board * which have to do with those parts of the pertinent orders of the Board which related to the reinstatement of employees, illustrate a method which the courts have invented for dealing with this peculiar form of relief when the Board's order is too indefinite for immediate enforcement, but is predicated upon findings of unfair labor practices sustained by the court. In the first of these cases—the *Agwilines* case—the court "affirmed in principle" but remanded the case and directed the Board, if the matter were not settled by the interested parties, to make a definite finding and a new order on those issues, to make the same a part of the transcript, and to submit them to the court for review. In the meantime, the court's decision was, so to speak, held in suspense. The other two cases are similar.

The cases do not support the Board, because in each of them the court proceeded to a decision of all the issues which were in the power of the court to decide, and only remanded the case for such administrative action as was

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* *Agwilines, Inc.* v. *National Labor Relations Board,* 87 F. (2d) 146, 155 (C.C.A. 5th); *National Labor Relations Board* v. *Bell Oil & Gas Co.,* 91 F. (2d) 509 (C.C.A. 5th); *Mooresville Cotton Mills* v. *National Labor Relations Board,* 97 F. (2d) 959, 964 (C.C.A. 4th).

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power to "enforce" without there first being a determination that the respondent had not complied with the order, "referred" to the Commission the question of a present violation, with directions to the Commission "to report its conclusions to this Court."

found to be necessary before a sufficiently specific order for reinstatement with back pay could be entered.

The Board's discussion of cases involving the granting by the appellate court of a request of a lower court for a return of the record * and of cases of remand without reversal † differs in no respect from the discussion of such cases in its brief in opposition to the petition for certiorari (pp. 16-17) and it does not even purport to answer petitioner's arguments addressed to such cases (Br. 58-64).

The Board cites 16 cases to show that situations sometimes arise in which an appellate court may remand a case to a lower court without deciding the merits—a proposition which petitioner does not dispute. The Board cites no case, however, in which an appellate court simply abdicated its jurisdiction and remanded the case without deciding anything, or in which, in fact, the court did not decide all the questions that were raised and which it could decide without exercising original jurisdiction and without encroaching upon the power of state courts to determine questions of state law.

This appears from the Board's own statement of the holdings of most of these cases. Thus, it cites four cases ‡ for the proposition that such a remand may be made

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* *Baltimore S. S. Co.* v. *Phillips*, 9 F. (2d) 902, reversed on other grounds, 274 U. S. 316; *Cimiotti Unhairing Co.* v. *American Unhairing Mach. Co.*, 99 Fed. 1003; *Sundh Electric Co.* v. *General Electric Co.*, 244 Fed. 163, cert. den. 245 U. S. 661; *Roemer* v. *Simon*, 91 U. S. 149; *Realty Acceptance Corp.* v. *Montgomery*, 284 U. S. 547; and *Hall* v. *United States*, 78 F. (2d) 168.

† *Ballard* v. *Searls*, 130 U. S. 50; *Jensen* v. *New York Life Ins. Co.*, 50 F. (2d) 512, cert. den. 287 U. S. 626.

‡ *Estho* v. *Lear*, 7 Pet. 130; *Levy* v. *Arredondo*, 12 Pet. 218; *Villa* v. *Van Schaick*, 299 U. S. 152; *United States* v. *Rio Grande Dam and Irrigation Co.*, 184 U. S. 416.

where the "record was insufficient" or "the evidence inadequate," i.e., where the court reversed the judgment or decree below on the ground that it was not warranted by the record before it, but remanded the case for further proceedings to the court of original jurisdiction in order that additional evidence might be taken which was found to be necessary for a final disposition of the case.

The Board cites two cases * for the proposition that such a remand, without decision, may be made "where a wrong rule of law was applied below." The Board's very statement reveals that the court determined that a wrong rule of law was applied below, reversed the judgment because it was erroneous, and remanded for further proceedings in accordance with law.

A remand because the court below has failed to make proper findings of fact † merely recognizes that the functions of this Court are appellate and do not include the examination of bulky records and the making of findings of fact. *Patterson* v. *Alabama,* 294 U. S. 600, involved a remand in order that the state court might reconsider its determination of a question of state law, the question being one which this Court was powerless to review and yet which, in view of a supervening decision, was necessary to be reviewed in order that the interests of justice might be accomplished.

In all such cases the court "reviewed and determined" the case to the fullest extent that it was within its power to do on the record before it, reversed the judgment or

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* *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202.

† *Lincoln Gas & Electric Light Co.* v. *City of Lincoln,* 223 U. S. 349; *Interstate Circuit, Inc.* v. *United States,* 304 U. S. 55. Cf. *Malleable Iron Range Co.* v. *United States,* 273 U. S. 674, cited by the Board (Ans. Br, p. 53).

decree, and remanded the case only because the grounds for the reversal were not such as finally to determine the controversy. None of these cases supports the proposition which the Board apparently suggests that they establish—although it does not so state—namely, that a court whose jurisdiction has been properly invoked may, if it so pleases, abdicate its jurisdiction without deciding any of the questions which are raised upon the record before it and which are within its power to decide.

The Board apparently thinks that in such cases all that the court does is enter a "formal reversal" without deciding anything, and that even the "formal reversal" is made only to remove technical impediments which would otherwise exist to further action below, or to a further appeal after further action below. The cases cited by the Board in this connection * add nothing to the Board's argument. Most of them are cases in which the proceeding was remanded to the lower court in order that it might take into consideration events supervening since its prior decision and necessary to be considered in order that the ends of justice might be accomplished. Such cases are not at all analogous to the present situation, and in each of them the case was remanded, *at the instance of the appellant*, only after the court had determined that the supervening fact had obvious and direct effect upon the validity of the decree being reviewed, and that the supervening fact could not be given effect in the first instance by the appellate court but required further action by the lower court.†

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* *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis*, 224 U. S. 503, 509; *Missouri* v. *Public Service Commission*, 273 U. S. 126, 131; *Dorchy* v. *Kansas*, 264 U. S. 286, 291; *Villa* v. *Van Schaick*, 299 U. S. 152, 155, 156; *International Ladies' Garment Workers' Union* v. *Donnelley Garment Co.*, 304 U. S. 243, 251–52; *Baltimore S. S. Co.* v. *Phillips*, 9 F. (2d) 902, 903, reversed on other grounds, 274 U. S. 316.

† Cf. *Butler* v. *Eaton*, 141 U. S. 240.

Point V—Arguments of Public Policy

Arguments of public policy are made by both sides in this case (Br. 23-27, 43-46; Ans. Br. 33-35, 60).

The Board argues that its purpose in the case is a sound one; that it has changed its procedure since the *Morgan* decision and is willing to reconsider its order in the light of exceptions to an interim report, and that petitioner is taking an obstructionist's position by resisting the Board's proposed action.

As to this phase of the argument, however laudable the Board's purpose may be—or would be if the petitioner were not complaining of many errors besides the lack of an interim report, and which would not be cured by an interim report—the Act does not provide for its accomplishment; and it can accomplish its purpose only by reference to general principles and by a construction of the statute which will be of general application. Hence the case may not be considered without looking at the results which might follow in other cases and other situations which may arise in the future.

With this thought in mind, we pointed out in our brief the extent to which the Board's interpretation of the Act would limit or condition the scope of judicial review (Br. 23-25, 27) and the wide field of administrative power and discretion that would be open to the Board, in this or any other case, after it had divested the court of jurisdiction (Br. 25-26).

Referring to the latter subject, we pointed out in our brief (pp. 25-26) that if the Board gets this particular case back into its control, or any subsequent case where it procures a dismissal or "remand" for the purpose of additional proceedings, the correction of particular errors or the retrial of particular issues—assuming that it is right in

construing the statute so that in such a situation its powers under Sec. 10(b), (c) and (d) are revived—it may either let the case lapse for a time because of some supposed reason of policy; or amend its complaint to charge additional unfair labor practices, and either take more testimony or determine the amended issues on the existing record; or may consolidate the case with other cases against the petitioner, present or future; or may take additional evidence to support any of its charges, but refuse to permit the petitioner to take additional evidence on other issues; or may take any other steps, or combination of steps, which it might have taken before the case was brought to issue.

The Board does not answer the substance of this argument, but attempts to turn it aside with the suggestions that the Court "will not accept an argument which impugns the good faith of an administrative agency" (Ans. Br. 34); that we are attempting "to conjure up hypothetical abuses which might be committed by the Board," and that the Court will not "speculate" as to any further proceedings which the Board may take, "nor will it assume that they will be irregular in any respect" (Ans. Br. 35).

It is surprising that the Board so characterizes the hypothetical cases which we have put. Being an administrative as well as quasi-judicial body, the Board naturally, and doubtless quite properly, must be affected from time to time by considerations of policy and by factors of an economic, social or political character. We have not suggested that action taken on the basis of such considerations would be "irregular," and we could hardly do so because the action that we refer to would be expressly sanctioned by the Act, if construed as the Board interprets it. Nor

do we either impugn the good faith of the Board or suggest that it would be guilty of intentional "abuses."

There is room for a difference of opinion as to what constitutes an "abuse." We are inclined to agree with the Board, however, that from the standpoint of good government, resort to any of the possibilities mentioned—after the case had once been submitted to the court and the issues therein made—would very likely be an "abuse" of administrative procedure, tending to break down the safeguards of quasi-judicial action, resulting in a confusion of the prosecuting and judicial functions, and tending to prevent the prompt, effective and even-handed justice which is the administrative ideal.

Therefore we say that the Act should not be construed so as to make such abuses possible. Yet under the Board's interpretation they would not only be possible, but they would be sanctioned by express grants of statutory authority set forth in plain language in Section 10(b), (c) and (d) of the Act and by the Rules and Regulations of the Board.*

Our argument is further strengthened by considering the relative positions of the Board and the opposite party under the Act as presently understood, as compared with their relative positions under the Act as interpreted by the Board.

The employer, when he is before the Court, is concluded by the record which he has made before the Board. If he has not properly raised his constitutional, procedural or substantive objections, he may not raise them in the court, however valid they may be, unless his fail-

* See N.L.R.B., Rules and Regulations, Series 1, as amended, Sec. 36.

ure or neglect "shall be excused because of extraordinary circumstances" (Sec. 10(e)).

He is, moreover, concluded by the testimony in the record, and may not supplement it unless he can establish "that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board" (Sec. 10(e)).

It may be noted in passing that, after the Board's order in the present case was made, petitioner filed a petition for leave to take additional testimony before the Board, pointing out serious omissions in the Board's report and findings, including its failure to mention by a single word the condition of industrial affairs which was the background of every fact referred to in the report, namely, the wave of sit-down strikes in the State of Michigan and elsewhere during the period which the report covered.

This petition the Board denied when the ink on the filing stamp was hardly dry (R. 5). While we have no doubt that the Board makes every effort to perform its duties impartially as it sees them, we can hardly believe it would have dealt thus summarily with a similar petition by its prosecuting arm or with a conclusion of its review division that the Board's evidence to support the charges was "incomplete." *

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* Thus in its Annual Report for the year ended June 30, 1936, the Board stated, under the heading "Procedure of the Board" (p. 25):

> "The Board, after examination of the record, may conclude that the record is incomplete, in which event it may require the taking of further evidence before the Board or a trial examiner (art. II, sec. 36, Rules and Regulations). Usually, the Board requires the taking of further evidence on its own initiative. . . ."

We have said that the employer, when he gets to court, is concluded by the record. He is also concluded by any finding which is "supported by evidence"; and, however much the preponderance of evidence may be in his favor, the court is powerless to enforce its own conception of the truth as established by the record.

Nor did the employer have the advantages of the Board's prosecuting department in the obtaining and putting in of testimony. The Board has the broadest investigatory powers, including access to the employer's files and the right to copy evidence therefrom,* and a sweeping power of subpoena to compel the attendance of witnesses and the production of evidence "from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

The employer, on the other hand, has no access to the files or records of any complainant, and has no power of compulsory processes. If he desires a subpoena—a right which any private litigant may obtain as of course, and generally from the clerk of any court in which his suit is pending—he must make application to the Board therefor, and in such application must disclose not only the names of his witnesses but also the nature of the testimony which he proposes to adduce by each of them, after which the Board may grant the subpoena if it sees fit. N.L.R.B.

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* The Board has the power to file a complaint against any person, without limitation, "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice" (Sec. 10 (b)). The Board is not required, before filing a complaint, to make any investigation of the charge (though doubtless it does make some investigation), or to satisfy itself that the charge has been made by a responsible person or has a basis of fact, or to make any finding of public interest.

Rules and Regulations, Series 1 as amended, Art. II, Sec. 21.

The only substantial rights conferred upon the employer are in respect of judicial review. Prior to the time when the issues are made in the court, his express rights under the statute are confined (Sec. 10(b), (c) and (d)) to the right to file an answer; "to appear in person or otherwise and give testimony at the time and place fixed in the complaint"; and to have notice of the original hearing, of any later hearing to take more testimony, of any argument before the Board, of the Board's order, and of its intention to make any change therein after it has been issued.

In view of the nature of these provisions, and of the sweeping powers which they confer upon the Board, the presence in the statute of effective provisions for judicial review is of the utmost importance.

The Board's construction of the Act would largely nullify those provisions. Nothing that the Board had done prior to submission to the court would be conclusive upon it. If in any respect the record should preclude it in respect of issues which it might like to raise, it would only have to dismiss or ask a remand in order to correct the record so as to raise such issues.

If the respondent had properly raised and preserved his constitutional and other objections to the Board's procedure, and raised meritorious defenses, the Board need not litigate them, but could simply divest the court's jurisdiction and endeavor to remove the issues. If the Board's pleadings were defective, it could take the case back and amend them.

Nor would it any longer be necessary for the Board, like the employer, to show good cause for the taking of

additional testimony if it should desire to do so. It would merely have to divest the jurisdiction of the court and take such additional testimony at its pleasure, and without according any correlative right to the opposite party.

It is submitted that under the Board's construction of the list, no effective judicial review of its orders could ever be had except with the Board's consent.

There is one other phase of the Board's policy argument which deserves mention—the argument that it is in some way "expediting," or invoking a "power to expedite," the final determination of the issues, and that the court below remanded the proceeding in No. 183 in order to "avoid the decision of questions which it may not be necessary for it to decide" (Ans. Br. 56).

This thought is carried forward at the end of the brief, where the Board accuses us of arguing "that a court must take upon itself the burden of deciding questions which further administrative proceedings may render moot" (Ans. Br. 60), and says:

> "The contention not only imposes a completely unnecessary rigidity * upon the procedure of court review of administrative orders, but runs counter to the well settled policy that a court will not itself attempt to decide issues where they may be determined by further administrative proceedings. *Porter* v. *Investors Syndicate,* 286 U. S. 461, 468; *United States* v. *Illinois Central R. R. Co.,* 291 U. S. 457, 463; *Utley* v. *St. Petersburg,* 292 U. S. 106, 109-110. * * *"

* Under the Board's theories, the procedure of judicial review, as respects the rights of the employer, would continue in all its "rigidity"; but as respects the Board all "rigidity" would be eliminated and the procedure would become completely flexible.

The cases cited have nothing to do with the proposition for which they are cited, but merely apply the familiar rule that, in matters within the jurisdiction of an administrative body, a party may not resort to the courts until he has exhausted his administrative remedies under the statute.

The suggestion about expediting the case is meaningless, because—assuming that no conclusion can be reached or assumption made as to the merits and legal effect of the petitioner's various defenses—no one can know whether the proposed procedure would in fact expedite or in fact delay the ultimate determination of the issues, except a clairvoyant who can look into the future and determine how the various defenses will ultimately be decided.

Moreover, the suggestion that the Board is avoiding "a long litigation" over questions which it is not necessary for the courts to decide, is a fictitious contention. There is no reason whatever why there should be a long litigation over the Board's failure to follow a procedure which finds sanction in the *Morgan* case, because the Board has already stated that it does not wish to litigate this point, and the court is entitled to act accordingly. If the Board hereafter changes its mind and decides to litigate the question, the fault cannot be attributed to the petitioner.

If on the other hand, as we think, it must be assumed (1) that petitioner's defenses are meritorious and (2) that a number of them, if ultimately established, would render nugatory the prior service of an interim report and exceptions and argument thereon, the Board is clearly not invoking a "power to expedite," but a power to delay and to defeat the prompt operation of the statutory provisions for judicial review of the Board's orders.

It is submitted that every consideration of public policy requires a reversal of the orders below.

Point VI—The Board's Jurisdictional Objections

We will not repeat the arguments with respect to the points of jurisdiction which we made in our brief (at pp. 74-86), but will confine ourselves to answering the new arguments which the Board now advances. In so doing, we again call attention to the fact that the jurisdictional point is of no importance unless the Court affirms the order in No. 182, since the whole basis of it is the alleged effect of the order of May 5 allowing the Board to withdraw its petition for enforcement.

The Board devotes a separate point in its brief (Point II, pp. 35-43) to an argument in which it seeks from this Court, in No. 183, relief which it did not request in the court below, namely, a dismissal of the petitioner's petition for lack of jurisdiction (Ans. Br. 35, 43). It asks this Court (at p. 36) to hold that the court below "was without jurisdiction to make the order,* and that it should therefore be reversed, and the case remanded to the court below with directions to dismiss the petition for lack of jurisdiction" (see also Ans. Br. 43).

In the Board's brief in opposition to the petitions for certiorari, it recognized that it had waived this point, saying that it did not ask for a writ of certiorari (at p. 14) because "the granting of this motion to remand has the same practical result as the granting of its motion to vacate would have had, namely to permit the Board to set aside its order against petitioner and take further proceedings."

As we said in our brief (p. 75), the making of the motion to remand was itself a waiver of the court's jurisdic-

* The order referred to is the order remanding the case to the Board.

tion, certainly in the light of the Board's failure to ask for review. Not only did the Board make no motion to dismiss in the court below, but it waived the jurisdictional point in another way. After the court on May 9 had made its order in No. 182 vacating its permission to the Board to withdraw the transcript of the record, and its order in No. 183 that the transcript should be deemed filed in that case, the Board moved the court to have the case (i.e., petitioner's petition in No. 183) set down for argument, and the court upon this motion advanced the case for argument at its June session*. This motion was a submission to the jurisdiction of the court, and the court treated it as such. It therefore properly denied the Board's motion to vacate the order of May 9 with respect to the transcript of record, even assuming that such motion was based upon the jurisdictional objections now advanced (R. 108).

The Board now argues that it did not waive the jurisdictional objections which it now makes because it could not waive them, as they go to the essence of jurisdiction of the subject-matter, and may be raised at any time or noticed by this Court upon its own motion.

Clearly the points are not of that character. On May 5, the date which is chiefly important, the court had jurisdiction of "the proceeding" under the express terms of the Act, and full jurisdiction of both the subject-matter and the parties. This the Board concedes (Ans. Br. p. 40).

The Board does not deny, nor could it deny, that on May 5 the court had power to assume jurisdiction of the

* A certified copy of such motion and a certified copy of the court's order pursuant thereto have been filed in this Court, as supplements to the transcript of record.

petitioner's case while relinquishing jurisdiction of the Board's case, by means of orders providing that the transcript of record should be deemed filed in the petitioner's case and that the Board might take a voluntary dismissal of its petition. This the answering brief in effect concedes (pp. 39-40).

The Board's objections simply go to the manner in which the court below exercised or failed to exercise its admitted powers. Such a point does not go to the essence of jurisdiction since "jurisdiction" includes the power to decide erroneously as well as correctly, *Binderup* v. *Pathe Exchange*, 263 U. S. 291, and presumably also includes the power to correct error if it has been made.

Nor does the Board deny that the court below, like all other courts, had a plenary power to correct, modify or set aside its own orders during the term at which they were made, and that it could have exercised that power fully and effectively on May 9.

All that the Board asserts is that a supervening event—the issuance of its notice of May 6 that it proposed to set aside its order on May 10—prevented the court from exercising on May 9 its plenary power to modify its order of May 5 so as to accomplish its purpose, namely, to recognize or assume jurisdiction of the petitioner's case while relinquishing jurisdiction of the Board's case.

The contention is (Ans. Br. 40)

> "The order of May 5, followed by the Board's action of May 6, like the dismissal of an appeal, 'ended the case in that court, and deprived it of all power to add to or alter the record as certified.' *Realty Acceptance Corp.* v. *Montgomery*, 284 U. S. 547, 552."

Board then goes on to contend that when a court
ce divested itself of jurisdiction and, pursuant
, jurisdiction "has vested in and been exercised by
r or other court," the first court cannot, by a recon-
ion of its decision, revest jurisdiction in itself. For
oposition it cites *Ex parte Skinner & Eddy Corp.*,
and, after discussing that case, finds further author-
decisions which, the Board claims, uniformly hold
ce a cause has been remanded by a federal district
o a state court, and the state court has had further
dings pursuant to the remand, "the federal court
erless to vacate its former order."

ther words, the general principle invoked by the
is that where an appellate or reviewing court makes
r of dismissal or remand, and thus ends its jurisdic-
the cause in the sense that it terminates the pro-
before it, any action taken by the lower or other
hereafter will defeat the appellate court's plenary
over its own orders during the term in which they
ade.

uch proposition of law has ever been applied by
rt, so far as we know. The Board's citations are
mple of its willingness to generalize from cases
with a peculiar situation and thus to produce a
rule opposite to the general rule in fact estab-
by the authorities.

ealty Acceptance Corp. v. *Montgomery*, 284 U. S.
e circuit court of appeals on a previous appeal,
firming a judgment, had vacated its affirmance so
one procedure or another, the district court could
ount of newly discovered evidence. This decision
proper (and on the subsequent appeal it was so

held) because, as we stated in our brief (p. 60), the trial court's term had expired and it had no power to consider newly discovered evidence; hence the circuit court of appeals had no power to remand the case for that purpose. After a new trial was had and another appeal taken, the appellate court held that its original action was improvident and restored its original judgment; and this Court affirmed.

The case in no way supports the Board's proposition, and its isolation of the words which it quotes at page 40 of its answering brief is a plainly mistaken representation of how the case was decided and what the words mean.

Ex parte Skinner & Eddy Corp., 265 U. S. 86, 95, though the Board describes it as "precisely applicable to the present situation, and * * * conclusive," is equally irrelevant. Following a voluntary dismissal of a suit in the Court of Claims, plaintiff began suit on the same claim in a state court, pursuant to statute, against the Emergency Fleet Corporation. Subsequently the Government applied to the Court of Claims to vacate the order of dismissal and for leave to file a counterclaim, and the court vacated such order and granted the leave prayed for. On writ of mandamus, this Court held that the action of the Court of Claims was improper, first because the plaintiff was entitled to the voluntary dismissal which he had asked for, and second because of the "special reason" that the governing statute expressly prevented a person from filing *or prosecuting* a suit in the Court of Claims after he had instituted another suit on the same claim in another court against a person professing to act for the United States.

The Court did not hold that any general principle would have prevented the court from restoring the case to its calendar at any time during the term of court in

which the voluntary dismissal had been granted, if it had been improperly granted. On the contrary, the Court expressly held that the jurisdiction which the Court of Claims had parted with could not "be resumed by a retroactive order * * * *in view of* the restrictive provisions" of the statute referred to.

The other cases which the Board cites, being those involving remands by district courts to state courts, are merely examples of a particular rule, based upon a statutory requirement, which applies solely to cases where the remand is on the ground of improper removal. Being based on an express statute (Jud. Code § 23), they are recognized to be a strictly limited exception to the general rule that a court may set aside its own judgment or order during the term at which it was entered. *Empire Mining Co.* v. *Propeller Tow-Boat Co.*, 108 Fed. 900, 904-05; *cf. Travellers' Protective Assn.* v. *Smith*, 71 F. (2d) 511.

Moreover, in the only one of the Board's cases in which the rule was actually applied, the Court expressly stated that it was immaterial whether or not the state court had taken further proceedings. See *Ausbrooks* v. *Western Union Telegraph Co.*, 282 Fed. 733, 734.

The rule does not apply to remands of cases from federal to state courts on any other ground except improper removal, and in any other case the district court may vacate its order of remand, as one of the Board's cases clearly shows, *Travellers' Protective Ass'n.* v. *Smith*, 71 F. (2d) 511, 513; *cf. Bankers Securities Corp.* v. *Insurance Equities Corp.*, 85 F. (2d) 856, 860, and without inquiring whether or not proceedings have been had in the state court subsequent to the remand.

The only effect of the Board's authorities is to confirm the principle, which was fully applicable below, that,

in so far as the court's orders of May 5 were inconsistent with a recognition of jurisdiction of the petitioner's case, the court had full power to amend them; and it exercised that power on May 9.

There is no substance in the Board's contention that the order of May 9 with respect to the transcript of the record could not have a "retroactive" effect. All orders of a court which vacate its previous orders have a "retroactive" effect, and restore, or require to be restored, the situation as it would have existed if the original order had never been made.

The point is that the Board made an order on May 5 with respect to the withdrawal of the record, which order it later found to be improvident, and annulled. The court having so held, and having thus exercised its familiar judicial powers for the purpose of making clear its recognition of, and intention to assume, jurisdiction of the petitioner's case—and the Board not having asked for a review of the order in question—it has no standing to urge before this Court that the order of May 5, insofar as it granted leave to withdraw the certified transcript, was correct and should not have been annulled by the order of May 9.

The suggestion that the Board, by issuing its notice of May 6, could prevent the court from exercising its plenary power over its own orders is without support in the authorities. Even if the order of May 5 granting permission to the Board to withdraw its petition and the transcript could be treated as a final disposal of the proceeding (instead of merely as a permission to the Board to take a step which, if taken, would have terminated the proceeding), the court could still annul the effect of such order, since all judgments, decrees or other orders of the

court, however conclusive in character, are under the control of the court which pronounces them during the term at which they are rendered, and they may be set aside, vacated, modified or annulled by that court. *Zimmern* v. *U. S.*, 298 U. S. 167; *Bronson* v. *Schulten*, 104 U. S. 410, 415; *Ayres* v. *Wiswall*, 112 U. S. 187.

The order of May 5 is certainly no more final than a decree dismissing an original bill in equity, which can be reversed, upon re-hearing, like any other final order during the term at which it was entered (Rules of Civil Procedure, Rule 60(b), former Equity Rule 69); and no more final than the dismissal of an appeal, which can likewise be reconsidered and set aside, *Caldwell* v. *Texas*, 141 U. S. 209.*

The plenary power of an appellate court over its own orders continues during the term of court, even after it has sent down its mandate to the lower court. *Prudence Company, Inc.* v. *Fidelity & Deposit Co.*, 298 U. S. 642; *Bank of Commerce* v. *Tennessee*, 163 U. S. 416. A rule of this Court expressly provides that mandate shall issue "irrespective of the filing of a petition for rehearing," thus recognizing that the mandate and the lower court's subsequent action do not affect the power of the court upon rehearing. Sup. Ct. Rules, Rule 34.

It results from the foregoing discussion that the principal basis of the Board's jurisdictional argument—that the court could not exercise its plenary power over its May 5 order because of the Board's May 6 notice of its intentions as to future action—is totally without support in the authorities; that in fact the authorities all show that it

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* This Court may reconsider the denial of a petition for certiorari, even where the motion for a rehearing thereon is made after the time for making it has expired under its rules. *Irwin* v. *The Missouri Valley Bridge & Iron Co.*, 275 U. S. 572.

had such power and could exercise it as it did, and that such exercise rendered invalid any intervening action by the Board prior to May 9 when the May 5 order was vacated.

The Board's notice of May 6 could not deprive the circuit court of appeals of jurisdiction of the proceeding, and of the power to alter or set aside its May 5 order during the term at which it was entered any more than it could have prevented this Court from altering or setting aside such order on review by certiorari.

The other arguments of the Board with respect to its jurisdictional point do not require extended discussion.

The first is that the petitioner, when it filed its petition for review in No. 183, was not a "person aggrieved" by the Board's order within the meaning of the Act, because the Board had previously announced "that it would move to dismiss its own proceeding" and "would voluntarily grant that which petitioner sought—the setting aside of the order" and further proceedings to meet the requirements of the *Morgan* case.

Even assuming that such is what petitioner is asking (as it is not), still the argument merely begs the question. Whether or not the petitioner was a "person aggrieved" depends upon whether the Board had power to take back the proceeding and amend its own order. If so, and the *Republic* case applies, then it was not a "person aggrieved" by the order. If on the other hand the court, admittedly having jurisdiction in No. 182, either did not divest itself of that jurisdiction, or recognized and assumed jurisdiction in No. 183, then the Board had no power to amend its own order, and the petitioner was a "person aggrieved". At most, this argument is just another way of stating the jurisdictional argument dealt with above.

The third jurisdictional point of the Board relates to the alleged incompleteness of the record when the court made its order of May 9, by reason of the absence therefrom of the Board's notice of May 6. This, so far as it is a different point from that which we have discussed above, has been fully dealt with in our brief (pp. 84-86).

The Board does not now urge that Section 10(f) requires a duplication of physical transcript when one is already on file pursuant to a petition to enforce or review the same order of the Board. But, making a cryptic reference to the Act, it urges that the Act contemplates "at least an order consolidating the cases, or deeming the transcript on file in the first case filed in the second." (R. 39.)

It does not explain, however, why such an order is not purely a formal one, recognizing that a specific requirement of the Act need not in fact be met because the record on file is a sufficient compliance therewith. It wholly ignores the fact that, either under the statutes applicable to appeals, or (if that be not applicable) then under the specific ruling made by the court below, such record became available to the petitioner at the moment of time when it filed its petition.

The Board's arguments as to jurisdiction in petitioner's case are super-technical, unrealistic, and, even as such, unsound, and are, moreover, not of such a nature that they permit raising collaterally in this Court a question on which the Board has not asked for review by certiorari.

Respectfully submitted,

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